

## **Grocery Manufacturers Association**

### **Food Warning Wording Group – Regulatory Concepts**

1. Food is different: People buy it every day; they get information about it in places other than the store; its safety is highly regulated at both the federal level and by the California Department of Health; people regularly purchase foods at restaurants and small shops that are exempt from Prop 65; Prop 65 chemicals to which people are exposed in prepared or processed foods they purchase are chemicals they create and are exposed to when they prepare raw foods at home; and OEHHHA and the courts have treated food differently than other products for purposes of Prop 65 warnings. As spelled out in GMA's prior written comments and as demonstrated by prior regulations and case law, OEHHHA has ample authority to adopt a regulation in accordance with the concepts below. *See, e.g.,* Cal. Code Regs., tit. 22, §§ 12703(b)(1), 12501; *Nicolle-Wagner v. Deukmejian*, 230 Cal. App. 3d 652, 660-61 (1991).

2. A Prop 65 food warnings program should be centered on a web site containing information regarding Prop 65 chemicals in foods and references to other relevant sources. A website can provide consumers with more nuanced and useful information about chemicals in foods they purchase and prepare. Combined with the media campaign (see below), the website will inform subsequent purchases, regardless of where the consumer shops.

3. It is clear – from the text of Prop 65, the language and administrative history of its implementing regulations, and case law – that warnings are required only prior to *exposure*, not purchase. Cal. Code Regs., tit. 22, § 12601(a), (b)(3); *Ingredient Communication Counsel, Inc.*, 2 Cal. App. 4th 1480, 1493, 1494-95 (1992); Final Statement of Reasons for section 12601, at 24 (regulations expressly amended to avoid requiring pre-purchase label warnings). However, to optimize pre-purchase information, an advertising campaign coinciding with or preceding the initiation of in-store warnings would provide:

- A brief description of Proposition 65;
- Announcement that a website will provide consumers with information concerning Prop 65 chemicals present in foods.

4. Retailers that sell food will provide a single, centralized in-store warning (spelled out in the regulations), referencing the website. Retailers may choose among workable options, including a statement on register receipts or a sign or poster at the cash register, on a kiosk, or otherwise visible to most customers. (The safe-harbor warning method should not be tied to specific technology, to prevent obsolescence.) The message should communicate:

- Proposition 65 chemicals are present in many foods because they are naturally occurring, are produced by cooking, are present in water, or are added.
- There is wide variation in the amount of chemicals present in any given food and the risks associated with such exposures.
- Further information about Proposition 65 chemicals in foods that are sold in this store may be obtained at [[www.\\_\\_\\_\\_.com](http://www.____.com)]

5. A retailer that provides an in-store warning as described above will be deemed to have fully complied with Prop 65 with regard to exposure to listed chemicals in foods sold in its store.

6. On-package or on-shelf warnings are not required. (Manufacturers cannot isolate California from national chain of supply; and utilizing symbols in lieu of words will not prevent confusion by consumers in other states.) Because of variability in the chemical content of foods, warnings or symbols would inevitably appear on products that do not require a warning, contrary to the statute's "clear and reasonable warning" provision. *See* Final Statement of Reasons for Cal. Code Regs., tit. 22, § 12703(b)(1), at 5; *Nicolle-Wagner v. Deukmejian*, 230 Cal. App. 3d at 660-61.